No. 93-517

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

BOARD OF EDUCATION OF THE
KIRYAS JOEL VILLAGE SCHOOL DISTRICT,
Petitioner,
v.
LOUIS GRUMET and ALBERT W. HAWK,
Respondents.

On Writ of Certiorari to the New York Court of Appeals

BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE AND THE CATHOLIC LEAGUE FOR RELIGIOUS AND CIVIL RIGHTS AS AMICI CURIAE IN SUPPORT OF PETITIONER

NANCY J. GANNON
ANDREW MCCAULEY
1011 First Avenue
New York, NY 10022
(212) 371-3191

ROBERT A. DESTRO
Columbus School of Law
Catholic University of America
Washington, D.C. 20064
(202) 319-5140
Attorneys for Catholic League for Religious and Civil Rights

JAY ALAN SEKULOW
(Counsel of Record)
JAMES MATTHEW HENDERSON, SR.
MARK N. TROOBNICK
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

KEITH A. FOURNIER
JOHN DAVID ETHERIDGE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570
Attorneys for American Center for Law and Justice

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QUESTION PRESENTED

Whether the Establishment Clause forbids a state from providing for the educational needs of handicapped children by accommodating their religious background?

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INTEREST OF AMICI *

American Center for Law and Justice

The American Center for Law and Justice ("ACLJ") is a not-for-profit public interest law firm and educational organization. The purpose of the ACLJ is to protect and promote First Amendment liberties, including the rights of freedom of religion, freedom of speech, and freedom of association. Chief Counsel for the ACLJ, Counsel of

* The parties in this case have consented to the filing of this brief. Letters of consent have been filed with the Clerk of Court pursuant to Rule 37.3.

Record here, has presented oral arguments in two of this Court's most recent Establishment Clause cases: *Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141 (1993); and, *Board of Education v. Mergens*, 496 U.S. 226 (1990). ACLJ files this brief in support of Petitioner, Board of Education of the Kiryas Joel Village School District, urging this Court to reverse the New York Court of Appeals decision which prohibits government from providing for the needs of handicapped children without regard to their religious background in violation of well-established constitutional principles.

Catholic League for Religious and Civil Rights

The Catholic League for Religious and Civil Rights is the nation's largest Catholic civil rights organization. It defends the right of Catholics—lay and clergy alike—to participate in American life without defamation or discrimination. Motivated by the letter and the spirit of the First Amendment, the Catholic League recognizes the importance of defending the religious freedom rights of all Americans, and is thus prepared to defend those rights in court.

SUMMARY OF ARGUMENT

The decision of the New York Court of Appeals grossly distorts basic constitutional principles, as well as the holdings of this Court regarding the Establishment Clause. Invoking the second prong of the test announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the New York Court of Appeals ruled that State accommodation of the secular concerns of a religious community, through purely secular means, advances or endorses religion and, therefore, violates the Establishment Clause of the First Amendment. *Grumet v. Board of Education of the Kiryas Joel Village School District*, 618 N.E.2d 94, 99-100 (N.Y. 1993) (citation omitted).

Contrary to the holding of the Court of Appeals, the very existence of an otherwise valid secular public school

district, whose boundaries are contiguous with a pre-existing government municipality, does not violate the Establishment Clause simply because the students or members of the community which it serves share common religious beliefs. In addition to misapplying *Lemon*'s *second* prong, the New York Court of Appeals failed to recognize that the statute at issue in this case, Chapter 748—which creates a secular public school district with boundaries contiguous to a pre-existing New York municipality, survives scrutiny under both the first and third prongs of *Lemon*.

This Court has not employed the test it applied in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), either as the sole measure of Establishment or in a rigid or formalistic fashion. Despite this Court's approach, however, lower courts routinely invoke the *Lemon* test as the sole means for winnowing out governmental Establishments. Rigid application of the *Lemon* prongs inevitably produces tortured results which are not compelled by, nor even consistent with, the principles of nonestablishment. This is particularly true of the open-ended "effects" prong. Any test which compels invalidation of government action solely upon the basis of a "primary effect" which advances or inhibits religion conflicts with the principles of free exercise and accommodation and should be abandoned.

This Court should adopt the well-articulated Establishment Clause analysis suggested by the dissent in *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573 (1989).

ARGUMENT

I. *LEMON v. KURTZMAN* DOES NOT REQUIRE THE INVALIDATION OF CHAPTER 748

This Court has "uniformly rejected" "an absolutist approach in applying the Establishment Clause" as "simplistic." *Lynch v. Donnelly*, 465 U.S. 668, 678 (1985). Indeed,

> [r]ather than mechanically invalidating all government conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so.

Id. (emphasis added).

Since *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court has grappled with various issues related to government activity within the sphere of the religious. In recent years, most decisions pertaining to alleged violations of the Establishment Clause have devolved on this Court's application of the three-part *Lemon* test set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). This Court, however, has not been slavishly devoted to the *Lemon* test. Rather, the majority opinions in two of this Court's most recent Establishment Clause cases did not apply the *Lemon* test at all. *Lee v. Weisman*, 112 S.Ct. 2649 (1992); *Zobrest v. Catalina Foothills School District*, 113 S.Ct. 2462 (1993). Furthermore, members of this Court, as well as numerous commentators, have expressed their displeasure with one aspect or another of the *Lemon* test. *See Lamb's Chapel v. Center Moriches Union Free School District*, 113 S.Ct. 2141, 2149-51 (1993) (Scalia, J., joined by Thomas, J., concurring) (cataloguing critical cases and commentaries). And, the Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area." *Lynch*, 465 U.S. at 679.

To date, however, despite the protestations noted above, it remains "well settled that a legislative enactment does not contravene the Establishment Clause if it has[: 1] a secular legislative purpose[; 2] if its principal or primary effect neither advances nor inhibits religion[; and, 3] if it does not foster an excessive government entanglement with religion." *Harris v. McRae*, 448 U.S. 297, 319 (1980) (explaining *Lemon*).

Misapplying the second prong of *Lemon*, the New York Court of Appeals concluded that Chapter 748—which creates an otherwise valid secular public school district with boundaries identical to those of a pre-existing unit of local government, the Village of Kiryas Joel—violates the Establishment Clause simply because the students or members of the community which it serves share common religious beliefs.[1] Specifically, the Court of Appeals determined that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.'" *Grumet v. Board of Education of the Kiryas Joel Village School District*, 618 N.E.2d 94, 99-100 (N.Y. 1993) (citation omitted). The reasoning of the Court of Appeals, like that of the Appellate Division, was primarily based on three factors:

> (1) the creation of a school district coterminous with a 'religious enclave', (2) the preexisting availability of special educational services for Satmarer handi-

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[1] The Court of Appeals did not reach the issue of the statute's validity under the first or third prongs of the *Lemon* test. *Grumet v. Board of Education of the Kiryas Joel Village School District*, 618 N.E.2d 94, 101 (N.Y. 1993).

capped children provided by the Monroe-Woodbury District outside the Village, and (3) that the true basis for the Satmarer's refusal to accept the integrated special educational services for their handicapped children outside the Village was the conflict which fully integrated schooling would present to their fundamental religious beliefs, or with cultural values inseparable from their religious beliefs.

Grumet v. Board of Education of the Kiryas Joel Village School District, 592 N.Y.S.2d 123, 133 (A.D.3 Dept. 1992) (Levine, J., dissenting).

Contrary to the holding of the Court of Appeals, Chapter 748, the statute at issue in this case, survives scrutiny under all three prongs of the *Lemon* test.

A. Chapter 748 has the Permissible Secular Purpose of Resolving an Intractable Political Controversy Over the Provision of Suitable Special Education Services for Satmarer Hasidim Children Residing in the Village of Kiryas Joel

It is clear from the face of the statute and its legislative history that Chapter 748 was enacted for the genuinely secular purpose of resolving the intractable political controversy between the Monroe-Woodbury School District and the Village of Kiryas Joel, concerning the provision of suitable special education services for the handicapped children of Kiryas Joel. Respondents attack this purpose, arguing that special education services were already available to the Kiryas Joel children through the Monroe-Woodbury Public Schools prior to the passage of Chapter 748. What Respondents fail to acknowledge, however, is the legitimate secular nature of the concerns raised by Kiryas Joel parents regarding the *suitability* of the limited special education services offered by the Monroe-Woodbury Schools and the legitimacy of the government's objective to end a longstanding, politically divisive conflict among its citizenry.

As repeatedly stated, the motive for the Satmarer parents' refusal to accept the special educational services for their handicapped children offered by the Monroe-Woodbury District was not religious, but was to protect the children from the psychological and emotional trauma caused by exposure to integrated classes outside the Village that were inadequately addressed by the professional staff of the Monroe-Woodbury District.

Grumet, 592 N.Y.S.2d at 131 (Levine, J., dissenting). Respondents incorrectly assert, however, as did the Appellate Division below, that the mere fact that the special needs of the Kiryas Joel children—a distinctively bilingual and bi-cultural learning environment—may have stemmed from their religious heritage somehow removes them from the realm of legitimate secular concern. This Court, however, has held that an otherwise valid secular purpose will not be invalidated simply because it coincides with a particular religious belief. *Bowen v. Kendrick*, 487 U.S. 589 (1988).

In *Bowen v. Kendrick*, 487 U.S. 589, this Court was faced with a facial challenge to the Adolescent Family Life Act (AFLA), "a [federal] scheme for providing grants to public or nonprofit private organizations or agencies [including religious organizations] 'for services and research in the area of premarital adolescent sexual relations and pregnancy.'" *Id.* at 593 (citation omitted). Applying the first prong of *Lemon*, this Court determined that "[t]here simply is no evidence that Congress' 'actual purpose' in passing the AFLA was one of 'endorsing religion.'" *Id.* at 604. The Court was careful to add, "[w]e also see no reason to conclude that the AFLA serves an impermissible religious purpose simply because some of the goals of the statute coincide with the beliefs of certain religious organizations." *Id. See also Harris v. McRae*, 448 U.S. at 319-20 (a statute does not violate "the Establishment Clause because it 'happens to coincide or harmonize with the tenets of some or

all religions' "); *McGowan v. Maryland,* 366 U.S. 420, 442 (1961) (same).

Respondents further question the State's creation of a public school district whose boundaries parallel those of a religious community. Yet, the Village of Kiryas Joel has been a validly incorporated municipality in the Town of Monroe, in Orange County, New York, since 1977. *See Grumet v. Board of Education of the Kiryas Joel Village School District,* 618 N.E.2d at 111 (Bellacosa, J., dissenting). In *Bradfield v. Roberts,* 175 U.S. 291 (1899), this Court upheld federal funding of the construction of a new building on the grounds of a religiously affiliated hospital. In so doing,

> the Court refused to hold that the mere fact that the hospital was 'conducted under the auspices of the Roman Catholic Church' was sufficient to alter the purely secular legal character of the corporation, particularly in the absence of any allegation that the hospital discriminated on the basis of religion or operated in any way inconsistent with its secular charter. In the Court's view, the giving of federal aid to the hospital was entirely consistent with the Establishment Clause, and the fact that the hospital was religiously affiliated was 'wholly immaterial.'

Bowen v. Kendrick, 487 U.S. at 609 (citations omitted).

Similarly, the religious demographics of the Kiryas Joel community should not raise constitutional questions. *See County of Allegheny v. American Civil Liberties Union,* 492 U.S. 573, 594 (1989) (the Establishment Clause, at the very least, prohibits the government from "making adherence to a religion relevant in any way to a person's standing in the political community"). The designation of school district boundaries contiguous with the existing local government unit was both logical and rationally-related to the delivery of educational services to Village residents.[2] Short of a factual showing that the

[2] It should be noted that, in 1978, the State of New York created the Village of Kiryas Joel Housing Authority, a municipal corporation with boundaries of authority coterminous with those of the pre-existing municipality and charged with the full privileges and duties of any other New York Housing Authority. N.Y. Public Housing Law § 549. Thus, the State's purpose here is not suspect as it was consistent with past practices.

school district is teaching, advancing or otherwise endorsing the particular tenets of the Satmarer Hasidim, or any other religious group, Respondents' Establishment Clause claim should fail.

Since *Lemon's* secular legislative purpose requirement is violated *only* when the governmental activity is *motivated wholly by religious considerations,* Chapter 748 satisfies the secular purpose prong of *Lemon.*[3] *See Wallace v. Jaffree,* 472 U.S. 38, 56 (1985) ("a statute that is motivated in part by a religious purpose may satisfy the first criterion," "a statute must be invalidated if it is *entirely* motivated by a purpose to advance religion"); *id.,* at 64 (Powell, J., concurring) ("We have not interpreted the first prong of Lemon . . . as requiring that a statute have 'exclusively secular' objectives"); *Lynch,* 465 U.S. at 681 n.6 ("a secular purpose . . . is all that Lemon v. Kurtzman, requires. Were the test that the government must have 'exclusively secular' objectives, much of the conduct and legislation this Court has approved in the past would have been invalidated") (citation omitted). As this Court held in *Lynch,* 465 U.S. at 680:

> [We have] invalidated legislation or governmental action on the ground that a secular purpose was lack-

[3] This Court, in *Board of Education v. Mergens,* 496 U.S. 226 (1990), cautioned that:

> Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law.

Id. at 249.

> ing, but *only* when it was concluded that there was no question that the statute or activity was motivated *wholly* by religious considerations. Even where the benefits to religion were substantial . . . we saw a secular purpose and no conflict with the Establishment Clause.

Id. at 680 (emphasis added). *Accord Bowen,* 487 U.S. at 602 ("a court may invalidate a statute only if it is motivated *wholly* by an impermissible purpose"). In *Lynch,* this Court expressed its "reluctance to attribute unconstitutional motives . . ., particularly when a *plausible secular purpose*" appears on "the face of the statute." 465 U.S. at 680 (emphasis added).

Chapter 748 is completely neutral on its face, creating a secular public school district to be governed by a secular, popularly-elected Board of Education which is required to comply with all rules and regulations of the State of New York concerning public education. The legislative history confirms that the statute was enacted for the purpose of providing needed bi-lingual, bi-cultural educational services to the handicapped children of the Village, which services they were not receiving from the Monroe-Woodbury School District, although guaranteed by state and federal law. Further, the creation of the Kiryas Joel School District served to bring an end to the rather long history of strife and political discord between the Monroe-Woodbury School District and the Village by providing for the special education of the Kiryas Joel children at a neutral secular site.[4] The statute, thus, passes muster under the first prong of *Lemon.*

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[4] Only shortly before the enactment of Chapter 748, the Court of Appeals, in *Board of Education v. Wieder,* 527 N.E.2d 767 (N.Y. 1988), suggested that, although the Monroe-Woodbury School District was not compelled by state law to provide handicapped education services to the Satmarer Hasidim students of Kiryas Joel at locations outside its regular public school classes, "[i]t may well be that certain of the services in controversy could be furnished to

B. The Principal or Primary Effect of Chapter 748 Neither Advances Nor Inhibits Religion in an Unconstitutional Manner

A State does not impermissibly advance religion by granting the citizens of a validly-incorporated municipality the authority to operate a secular public school system for the benefit of their children. This fact is not altered by the religious beliefs of individuals within a given community.

> [The New York Legislature] has the fundamental power to create a union free school district within the boundaries of a previously existing school district to facilitate the provision of public education to a particular group of students (see, e.g., Town of Greenburgh, USFD No. 13, chapter 559 of the Laws of 1972; Town of Mt. Pleasant UFSD, chapter 843 of the Laws of 1970; Gananda School District Act, chapter 928 of the Laws of 1972).

Grumet v. Board of Education of the Kiryas Joel Village School District, 618 N.E.2d at 112 (Bellacosa, J., dissenting). In fact, as Judge Bellacosa noted in his dissenting opinion below, Respondents "concede that approximately 20 such school districts have been created by acts of the Legislature." *Id.; see also* Second Amended Complaint, ¶¶ 62-63, Joint Appendix at 62.

Despite this fact, however, the Court of Appeals determined that the concentration of individuals with shared religious values in the community in question compelled

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defendants at neutral sites if plaintiff determined to do so." *Id.* at 775 n.3 (citing *Wolman v. Walter,* 433 U.S. 229 (1977).

Chapter 748 establishes just such a neutral site, a completely secular public school, providing the bi-lingual, bi-cultural learning environment needed by the handicapped children of Kiryas Joel, "located at a site which is not physically or educationally identified with but is reasonably accessible to the handicapped children residing within the Village." *See* Olivo Aff. ¶ 76, Petition of New York Attorney General for Certiorari [93-539] at 117a.

invalidation, in this instance, of what was otherwise an entirely permissible secular act. Specifically, the Court of Appeals held that Chapter 748 has the primary effect of advancing religion because "the statute not only authorizes a religious community to dictate where secular public educational services shall be provided to the children of the community, but also 'creates the type of symbolic impact that is impermissible under the second prong of the *Lemon* test.'" *Grumet v. Board of Education of the Kiryas Joel Village School District,* 618 N.E.2d at 99-100 (citation omitted).

The Establishment Clause does not compel the selective disenfranchisement of an otherwise validly created public school district because the local citizenry share common religious beliefs. Indeed, as this Court has previously held, the Establishment Clause, at the very least, prohibits government from "making adherence to a religion relevant in any way to a person's standing in the political community." *County of Allegheny,* 492 U.S. at 594. Yet, the decision of the Court of Appeals effectively declares the members of the Village of Kiryas Joel ineligible for public educational office on account of their religion.

> [Respondents] assert that the citizens of Kiryas Joel are exclusively Satmarer Hasidim and will remain as such. However, no claim is made of any alleged restrictive covenants among the Village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services. Indeed, there is no showing that non-Satmarer Hasidim students are precluded from attending and taking advantage of this special education program.

Grumet, 618 N.E.2d at 113 (Bellacosa, J., dissenting). In fact, the record affirmatively indicates that a number of non-Satmarer students currently attend the Kiryas Joel School alongside Satmarer children. *See* Olivo Aff. ¶¶ 64, 86 Petition of New York Attorney General for Certiorari [93-539] (hereinafter "NYAG") at 114a, 119a; Benardo Aff. ¶¶ 22-23, Petition of Monroe-Woodbury Central School District for Certiorari [93-527] (hereinafter "MWSD") at 121a.

In *Wolman v. Walter,* 433 U.S. 229, 248 (1977), this Court held that "providing therapeutic and remedial services at a neutral site off the premises of the nonpublic schools will not have the impermissible effect of advancing religion." Although the Court had previously invalidated attempts to provide remedial services on parochial school grounds, *Meek v. Pittenger,* 421 U.S. 349, 367-72, the *Wolman* Court emphasized that the "dangers perceived in *Meek* arose from the nature of the institution, not from the nature of the pupils." *Id.* at 247-48. Thus, the religious makeup of the students in the Kiryas Joel Village School District is irrelevant in determining the constitutionality of Chapter 748.

Further, this Court has consistently upheld the basic principle that "[t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." *Mergens,* 496 U.S. at 248 (quoting *McDaniel v. Paty,* 435 U.S. 618, 641 (1978) (Brennan, J., concurring)); *see also Employment Division v. Smith,* 494 U.S. 872, 902 (1990) (O'Connor, J., concurring) ("[t]he First Amendment was enacted precisely to protect the rights of those whose religious practices are not shared by the majority and may be viewed with hostility"). More specifically, this Court has categorically forbidden the disqualification of individuals from public office on the basis of religious belief. *See McDaniel,* 435 U.S. 618; *Torcaso v. Watkins,* 367 U.S. 488 (1961); *Wieman v. Updegraff,* 344 U.S. 183 (1952).

"The essence of the rationale underlying [Respondents arguments to invalidate Chapter 748] is that if elected to public office [members of the Kiryas Joel community] will

necessarily exercise their powers and influence to promote the interests of one sect or thwart the interests of another, thus pitting one against the others, contrary to the anti-establishment principle with its command of neutrality. . . ." *McDaniel*, 435 U.S. at 628-29. This rationale was specifically rejected by the *McDaniel* Court. *Id.* at 629.

The Legislature has, through Chapter 748, addressed the legitimate secular concerns of a religious community to have their children appropriately educated. The Legislature has done so without providing any improper direct aid or subsidy to any religious institution. In fact, as the Monroe-Woodbury School District has indicated in its Petition to this Court:

> [i]f the Kiryas Joel Village School District ceased to exist, the burden of providing programs and services for the handicapped students residing within the Village would devolve by federal and state law upon petitioner Monroe-Woodbury Central School District, which would then be required to meet such needs directly if the parents chose to enroll their students in the public schools or to otherwise furnish programs and services under the I.D.E.A. and the State's 'dual enrollment' Law to handicapped students attending parochial schools within the Village.

See MWSD at 15-16.

Simply stated, Chapter 748 provides a purely secular environment, not connected or associated in any way with any parochial school or religious institution, for the secular education of Village residents, regardless of their religious background.[5] The statute effectively provides

[5] Any "symbolic" impact which may be perceived from the creation or existence of the Kiryas Joel Village School District would most certainly be less than that created by any of the following: (1) the statutorily prescribed national motto, "In God We Trust," which appears on our currency; (2) the language, "One nation under God," in our Pledge of Allegiance; (3) the chapels which exist in the Capitol; (4) the venerable, "God save this Honorable Court," which begins each session of the Supreme Court; (5) legislative prayer; and, (6) the many Presidential Proclamations and messages concerning religious holidays and observances, including the National Day of Prayer.

Furthermore, the Kiryas Joel Village School District provides an entirely secular program of instruction, devoid of any religious training or inappropriate religious symbols; and, the District's building is not located adjacent to, nor otherwise affiliated with any religious school, institution or structure in the Village. *See* Benardo Aff. ¶¶ 11-12, MWSD at 118a.

for permissible secular educational services at a "neutral site" consistent with this Court's holding in *Wolman*, 433 U.S. 229.

Respondents point to the fact that the "secular" concerns the State sought to address through the enactment of Chapter 748 may also be tied to the religious beliefs of the Satmarer Hasidim. "The nonsectarian aims of government and the interests of religious groups often overlap, [however,]and this Court has never required that public authorities refrain from implementing reasonable measures to advance legitimate secular goals merely because they would thereby relieve religious groups of costs they would otherwise incur." *Texas Monthly v. Bullock*, 489 U.S. 1 (1989) (citing *Mueller v. Allen*, 463 U.S. 388, 393 (1983)). Furthermore, the availability of a more secular alternative has never been deemed relevant to the Establishment Clause inquiry. *Lynch*, 465 U.S. at 681 n.7. *See also County of Allegheny*, 492 U.S. at 636 (O'Connor, J., concurring in part and concurring in the judgment) (observing that a "more secular alternative" test "is too blunt an instrument for Establishment Clause analysis, which depends on sensitivity to the context and circumstances presented by each case").

The decision of the New York Court of Appeals inappropriately limits the rights and privileges of the citizens of Kiryas Joel because of their religion and beliefs. As discussed, infra at (II), the analysis of the court below fails to properly acknowledge the validity of government

accommodation of religion and the secular concerns of religious groups. Thus, the decision of the Court of Appeals should be reversed.

C. Chapter 748 Does Not Foster An Excessive Entanglement of Government and Religion

The entanglement prong of *Lemon* is not implicated in this case. Chapter 748 establishes a public school district with secular duties, privileges and objectives. This is not a case of parochial school aid, where the government is forwarding aid to "pervasively sectarian" schools who have "as a substantial purpose the inculcation of religious values." *Bowen*, 487 U.S. at 616 (citation and quotation marks omitted). Rather, the Kiryas Joel Village School District is a secular public school district, like any other, with a religiously pluralistic faculty and staff, whose sole purpose is providing purely secular educational services in a nonthreatening environment to the handicapped children of the Village. Thus, it is difficult to conceive of any possible entanglement between government and religion where the only possible monitoring will be of public employees engaged in secular functions on public school property.

II. THE "PRINCIPAL OR PRIMARY EFFECT" PRONG OF THE *LEMON* TEST SHOULD BE ABANDONED

The Court of Appeals invalidated, on its face, the New York Legislature's amicable resolution of a political stalemate between the Monroe-Woodbury School District and citizens of Kiryas Joel, because it serves to accommodate the secular concerns of a religious community. Elevating form over substance, the court below effectively ruled that the Establishment Clause bars *any* accommodation of a religious community, secular or not.

In contrast, this Court has never embraced such an absolute analysis. *Lemon* itself did "not call for total separation between church and state." 403 U.S. at 614.

See also Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973) ("It has never been thought either possible or desirable to enforce a regime of total separation"); *Wallace v. Jaffree*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment) (noting that "[c]haos would ensue" if every statute that promotes a secular goal but also has "a primary effect of helping or hindering a sectarian belief" were invalidated under the Establishment Clause). To the contrary, the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673.

This Court, more than forty years ago, recognized that:

> [w]hen the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show callous indifference to religious groups.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952). The promotion of religious freedom through government accommodation of religious concerns is wholly consistent with the Establishment Clause. *See, e.g., Zorach*, 343 U.S. 306 (upholding New York law providing for "released time" from public school instruction for students to attend religious instruction at nonpublic school sites); *Board of Education v. Allen*, 392 U.S. 236 (1968) (public money for textbooks supplied to parochial school students); *Everson*, 330 U.S. 1 (public funds used to pay for transportation of students to parochial schools); *Tilton v. Richardson*, 403 U.S. 672 (1971) (federal grants for buildings at church-related colleges); *Roemer v. Board of Public Works*, 426 U.S. 736 (1976) (noncategorical

grants to church-sponsored institutions); *Walz v. Tax Commission*, 397 U.S. 664 (1970) (property tax exemptions for churches); *McGowan*, 366 U.S. 420 (Sunday Closing Laws upheld); *Marsh v. Chambers*, 463 U.S. 783 (1983) (legislative prayer).

The focus of any Establishment Clause analysis should be "to determine whether, *in reality*, it establishes a religion or religious faith, or tends to do so." *Lynch*, 465 U.S. at 678. The existence of a "primary effect" which advances or inhibits religion should not, in and of itself, amount to a violation of the Establishment Clause. Such a standard is antithetical to the basic principles of accommodation and the free exercise of religion.

A. The Primary Effect Component of the Second Prong of the *Lemon* Test is Inconsistent with Both the Principles of Free Exercise and Accommodation

The "primary effect" test, by nature, invites lower courts to engage in a distorted analysis which fails to acknowledge the fact that "government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause." *Hobbie v. Unemployment Appeals Commission*, 480 U.S. 136, 144-45 (1987); *Lee v. Weisman*, 112 S.Ct. at 2661 ("A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution . . . . [A]t graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students").

The principles of free exercise clash directly with the requirement of the "effects" prong of *Lemon*. For instance, this Court has repeatedly held that the government may not withhold unemployment benefits from those who refuse to work on certain days or for certain employers, while, at the same time, upholding the government's

right to deny the same benefits to those whose reasons are not religious. *See Hobbie*, 480 U.S. 136 (violation of free exercise to deny unemployment benefits to individuals who refused to work on her Sabbath); *Thomas v. Review Board*, 450 U.S. 707 (1981) (violation to refuse benefits to person refusing for religious reasons to work for weapons manufacturer); *Sherbert v. Verner*, 374 U.S. 398 (1963) (violation to deny benefits to individual for refusing, according to her religious beliefs, to work on Saturday). Further, Congress has exempted religious organizations from Title VII's religious discrimination provision. *See* 42 U.S.C. § 2000e-1; *Corporation of the Presiding Bishop v. Amos*, 107 S.Ct. 2862, 2868-70 (1987) (upholding this provision). Congress has also exempted from military service those who object on religious grounds, while refusing to exempt those who object on other grounds. *See* 50 U.S.C. § 456(j) (1982); *Gillette v. United States*, 401 U.S. 437, 461-62 (1971) (upholding the provision).

It is clear, in each instance, that the government has permissibly accommodated the religious beliefs of citizens, despite the effect of aiding or advancing religion.

The mere fact that the Free Exercise Clause *may* not compel government accommodation in a particular instance, as in the case currently before the Court, does not render a government's decision to provide accommodation unconstitutional. For as this Court has held, "the scope of accommodation permissible under the Establishment Clause is larger than the scope of accommodation mandated by the Free Exercise Clause." *County of Allegheny*, 492 U.S. at 613 n.59. Thus, "even when the government is not compelled to do so by the Free Exercise Clause, it may to some extent act to facilitate the opportunities of individuals to practice their religion." *Marsh*, 463 U.S. at 812 (Brennan, J., dissenting). As Justice Kennedy has previously suggested, only in an "extreme case" should symbolic recognition or accommodation of religious faith violate the Establishment Clause. *County*

of Allegheny, 492 U.S. at 661 (Kennedy, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part).

Because accommodation is permitted under the Establishment Clause and sometimes required under the Free Exercise Clause, the mere existence of a "primary effect" cannot serve as an adequate basis for invalidation of a government action. *Cf. Washington v. Davis*, 426 U.S. 229 (1976). Thus, the second prong of *Lemon* should be abandoned.

B. This Court's Establishment Clause Decisions Provide Another, More Workable Framework for Analyzing Establishment Clause Claims. The Court Should Employ the Coercion Test and Direct Benefits Test Suggested By the Dissent in *County of Allegheny v. American Civil Liberties Union.*

In *County of Allegheny*, 492 U.S. at 659, Justice Kennedy suggested another Establishment Clause test, gleaned from Supreme Court precedents, to replace the *Lemon* test. Under Justice Kennedy's suggested formulation, a challenged governmental practice does not violate the Establishment Clause if it conforms with the following criteria:

> [A] government may not coerce anyone to support or participate in any religion or its exercise; and, it may not, in the guise of avoiding hostility or callous indifference, give direct benefits to religion in such a degree that it in fact establishes a state religion or religious faith, or tends to do so.[6]

492 U.S. at 659 (citation and internal quotation marks omitted).

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[6] *See also Mergens*, 496 U.S. at 258 (Kennedy, J., and Scalia, J., concurring in part and concurring in the judgment).

1. *The Court's Precedents Indicate that the Principal Means of Identifying Violations of the Establishment Clause are Either the Use of Government Coercion or the Distribution of Direct Benefits.*

The coercion prong of Justice Kennedy's formulation bars use of governmental compulsion or force to cause people to adopt religious beliefs or participate in religious rituals. The coercion prong is not a creature of Justice Kennedy's making; it is derived squarely from this Court's precedent, as Justice Kennedy noted in his opinion in *County of Allegheny*. 492 U.S. at 659-61. Indeed, as this Court firmly stated:

> [i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

West Virginia Board of Education v. Barnette, 319 U.S. 624, 642 (1943). It is long since beyond dispute that the Establishment Clause:

> forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.

Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

Of course, coercion of religious conduct or belief may provide an example of a direct benefit to religion, as Justice Kennedy noted:

> Barring all attempts to aid religion through government coercion goes far toward attainment [of the Religion Clauses]. . . . James Madison, who proposed the First Amendment in Congress, apprehended the meaning of the [Religion Clauses] to be, that Congress should not establish a religion, and

> enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience.

County of Allegheny, 492 U.S. at 660 (citations and internal quotation marks omitted).

The principal reason that a coercion standard more adequately reflects the aims and requirements of the Establishment Clause than does the *Lemon* test is that, "[a]bsent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal." *Id.* at 662. And "[t]he freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and Free Exercise Clauses." *Id.* at 661.

Justice Kennedy's "direct benefits" standard reflects this Court's evolving views regarding financial aid to religious institutions. *See Mueller*, 463 U.S. 388; *Witters v. Washington Department of Services for the Blind*, 474 U.S. 481 (1986); *Bowen*, 487 U.S. 589; *Zobrest*, 113 S.Ct. 2462. In its essence, the "direct benefits" prong finds no violation of the Establishment Clause when government aid inures to the benefit of religious institutions where: (1) the government benefit flows to individuals or secular recipients, who make a free choice to pass the benefits through to a religious institution; or, (2) the funding comes from a governmental program with a secular governmental purpose, and the religious organizations which enjoy the benefit are not the sole recipients of governmental money.

In *Mueller*, for example, the Court upheld a state income tax deduction for tuition and certain other school-related expenses even though the deductible amounts may have been paid by the taxpayer to a religious school. Minnesota granted a deduction for expenses incurred by parents from sending their children to any school, public, private or parochial. 463 U.S. 388. The tax deduction was not limited to those parents whose children attended private or parochial schools. *Id.* at 398. That any benefit at all "flow[ed] to parochial schools," the Court noted, resulted from "the private choices of individual parents" making education decisions. *Id.* at 400. Certainly, in such cases, there is no direct benefit flowing to religious schools from government, "[w]here, as here, aid to parochial schools is available only as a result of decisions of individual parents no imprimatur of state approval can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (citation and internal quotation marks omitted).

In *Witters*, this Court agreed that government money may be paid to individuals or secular recipients who then choose to donate it to a religious group. This Court said:

> It is well-settled that the Establishment Clause is not violated every time money previously in the possession of the State is conveyed to a religious institution. For example, a State may issue a paycheck to one of its employees, who may then donate all or part of that paycheck to a religious institution, all without constitutional barrier; and the State may do so even knowing that the employee so intends to dispose of his salary.

474 U.S. at 486-87.

The *Witters* Court applied this principle to facts beyond the governmental payroll scenario. Larry Witters qualified for a state program funding the college education of blind people. Witters was not a governmental employee; he was a blind benefit recipient. The Court found that the Establishment Clause did not bar the state from extending benefits to Witters under an existing program for the blind. The lower courts incorrectly had held that Witters' contemplated use of the money he received to obtain a Bible college education violated the second prong of the *Lemon* test. *Witters*, 474 U.S. at 482.

This Court has further reiterated this principle concerning "incidental" direct benefits to religion in *Bowen* and *Zobrest*. Thus, the "direct benefits" prong of Justice Kennedy's proposed test reflects the developments made by this Court in its Establishment Clause analysis of financial aid to religious institutions.

2. *There is Neither Coercion Nor Any Direct Benefit to Religion in the Establishment of an Entirely Secular Public School District to Address the Legitimate Secular Needs of the Handicapped Children of the Village of Kiryas Joel*

The notion of governmental coercion is not implicated by the facts of this case. The statute at issue here merely establishes a secular public school district for the education of the residents of a pre-existing government municipality, regardless of their religious background. There is no governmental compulsion or force to cause people to adopt religious beliefs nor participate in religious rituals. As Justice Kennedy has indicated, only in an "extreme case" should symbolic recognition or accommodation of religious faith violate the Establishment Clause. *County of Allegheny*, 492 U.S. at 661 (Kennedy, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part). This is not such an "extreme case," and the simple fact that a majority of the community share common religious beliefs does not compel a different result, as discussed elsewhere in this brief at (I)(B).

Chapter 748, as discussed *supra* at (I)(B), provides no direct aid or subsidy to any religious institution. No benefit accrues to the parochial schools of the Village because, pursuant to federal and state law, the Monroe-Woodbury public schools must shoulder the burden of providing educational services to the handicapped children of Kiryas Joel if the Village School District ceases to exist, not the Village's parochial schools. Furthermore, in analyzing "direct benefits" to religion, Justice Kennedy

has suggested that the Court must "refer to the other types of church-state contacts that have existed unchallenged throughout our history, or that have been found permissible in our case law." *County of Allegheny*, 492 U.S. at 662 (Kennedy, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part). Only if the challenged activity provides a greater or more direct benefit to religion than other permitted practices should it violate the Establishment Clause. *Id.* at 662-65. Any benefit to religion which may result from the establishment of a secular public school district to provide special educational services to the handicapped children of Kiryas Joel, regardless of their religion, is purely incidental[7] and is certainly far less significant than, for example:

> expenditure of . . . money for textbooks . . . to students attending church-sponsored schools[;] expenditure of public funds for transportation . . . to church-sponsored schools[;] federal grants for college buildings of church-sponsored institutions of higher education[;] noncategorical grants to church-sponsored properties[;] Sunday Closing Laws [previously] upheld; release time program[s] for religious training; and, . . . legislative prayers [also previously] upheld.

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[7] This is particularly apparent from the record which:

> documents sharp contrasts between the manner in which the secular special educational services are provided in the Kiryas Joel public school and the distinctive religious lifestyle of the Village. English is the [primary] language of instruction within the school; Yiddish is the medium of communication within the Village. In contrast to the method of instruction at the sectarian schools in the Village, male and female students at the public special education school are grouped together for teaching purposes at the special school; instructional materials are not based upon the sex of the student being taught; female employees are not prohibited from exercising authority over male employees; the physical appearance of the building is secular, including the significant absence of mezuzahs on the doorposts; and the dress of the employees is secular in appearance.

Grumet, 618 N.E.2d at 117 (Bellacosa, J., dissenting).

Lynch, 465 U.S. at 681-82 (citations omitted). Indeed, this Court has already upheld the constitutionality of the provision of analogous secular educational services to parochial school students at "neutral" or otherwise secular locations off parochial school grounds. *See Wolman*, 433 U.S. 229.

"There is no realistic risk that the [establishment of a secular public school district in the Village of Kiryas Joel] represent[s] an effort to proselytize or [is] otherwise the first step down the road to an establishment of religion." *County of Allegheny*, 492 U.S. at 664 (Kennedy, J., joined by Scalia, J., concurring in the judgment in part and dissenting in part). Chapter 748, therefore, should survive constitutional scrutiny.

III. THE LOWER COURT'S RELIANCE ON AN ASSUMED ENDORSEMENT EFFECT SERIOUSLY RESTRICTS THE SCOPE OF FREEDOM OF RELIGION AND CONSCIENCE

Based upon its observation that "[t]he residents of the Village of Kiryas Joel are of the Satmarer Hasidic religious sect"; and its factually unsupported conclusion that "[t]hus, only Hasidic children will attend the public school district, and only members of the Hasidic sect will likely serve on the school board," the Court of Appeals determined that the establishment of the Kiryas Joel School District effected a "symbolic union" between church and state, which would be perceived as an endorsement of the Satmarer Hasidic faith. *Grumet*, 618 N.E.2d at 100. The Court of Appeals, thus, declared that "the Legislature may not treat the Satmarer community as separate, distinct and entitled to special accommodation" simply because its "separatist tenets create a tension between the needs of its handicapped children and the need to adhere to certain religious practices." *Id.* at 101.

The court's "endorsement" assumption and its effect are particularly troublesome for several reasons: (A) the facts in the record are weighed against the court; (B) the implicaiton that a religious community is automatically disqualified from public service raises free exercise concerns; (C) the decision, as characterized by the Court of Appeals, places Satmarer parents in an untenable position forced to choose between a government benefit and their religious beliefs in violation of the Free Exercise Clause.

A. The Record Does Not Support "Endorsement"

As previously discussed, evidence in the record suggests, contrary to the holding of the Court of Appeals, that non-Hasidic students are served by the Kiryas Joel Village School District. *See* Olivo Aff. ¶¶ 64, 86 NYAG at 114a, 119a; Berardo Aff. ¶¶ 22-23; MWSD at 121a. Additionally, the transient nature of our society does not support the court's determination that only Hasidic Jews will serve on the school board, particularly where "no claim is made of any alleged restrictive covenants among the Village's property owners, or of any alleged irregularity in the conduct of municipal or school district elections, or of any exclusion of non-Hasidim in any respects of governance, employment or availment of educational services." *Grumet*, 618 N.E.2d at 113 (Bellacosa, J., dissenting).

Further, as the Monroe-Woodbury School District noted in its Petition to this Court, Chapter 748 "was passed by a Legislature devoid of members of the Satmar sect, was approved by a Governor of a different faith, and was supported by public officials of different faiths and by a wide variety of non-Satmar public institutions." *See* MWSD at 19.[8]

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[8] The record, in fact, suggests that Chapter 748 was enacted to alleviate government *disparagement* of the Satmarer religion, most notably, Monroe-Woodbury's subjugation of vulnerable handicapped children to an environment, hostile in every respect to their beliefs, despite its freedom to accommodate the unique needs of the students as expressly granted by the New York Court of Appeals in *Wieder*, 527 N.E.2d 767.

Even if the record did support the allegations made by the Court of Appeals, the notion posited, that government aid or programs must be invalidated when they are associated in any way with religion or religious interests, runs contrary to this Court's precedents. As this Court stated, in *Bowen,* 487 U.S. 589:

> If we were to adopt the District Court's reasoning, it could be argued that any time a government aid program provides funding to religious organizations in an area in which the organization also has an interest, an impermissible 'symbolic link' could be created, no matter whether the aid was to be used solely for secular purposes. This would jeopardize Government aid to religiously affiliated hospitals, for example, on the ground that patients would perceive a 'symbolic link' between the hospital—part of whose 'religious mission' might be to save lives—and whatever government entity is subsidizing the purely secular medical services provided to the patient.

Id. at 613.

B. Citizens May Not Be Disqualified for Public Office Because of Their Religious Beliefs

The implication which stems from the court's statement that "only members of the Hasidic sect will likely serve on the school board," violates the principle reiterated by this Court in *McDaniel,* 435 U.S. 618. The *McDaniel* Court reviewed the constitutionality of a Tennessee law disqualifying ministers or priests from serving as state legislators. Finding the law unconstitutional, this Court explained that "[t]o condition the availability of benefits [including access to the ballot] upon this appellant's willingness to violate a cardinal principle of [his] religious faith [by surrendering his religiously impelled ministry] effectively penalize the free exercise of [his] constitutional liberties." *Id.* at 626 (quoting *Sherbert,* 374 U.S. at 406. Similarly, conditioning the benefit of a school board office, or the benefit of having a locally controlled public school system, on the religious or nonreligious background of an individual or community violates the Free Exercise Clause, as well as the Religious Test Clause. *See* Bradley, *The No Religious Test Clause and the Constitution of Religious Liberty: A Machine that has Gone of Itself,* 37 Case W. Res. 674 (1987).

C. Invalidation of the New York Statute Creating the Kiryas Joel Village School District will Force Parents Either to Abandon their Children to the Hostile Environment Maintained by the Respondents, or to Forego their Rights Under State and Federal Law to Secular Special Education Services at Public Expense

This Court has previously recognized the right of a discrete, insular minority, much like the Satmarer Hasidim, to guard their children from the secular values and influences of the public schools. *See Wisconsin v. Yoder,* 406 U.S. 205, 218-19 (1972). In *Yoder,* this Court exempted Amish children from compulsory attendance laws which had made it difficult for them to maintain the separatist lifestyle and guard their children from foreign secular influences in accordance with the tenets of their faith.

In the same manner, according to the Court of Appeals, the Satmarer Hasidim's "separatist tenets create a tension between the needs of its handicapped children and then need to adhere to certain religious practices." *Grumet,* 618 N.E.2d at 101. The ruling of the Court of Appeals, invalidating Chapter 748, "forces [Satmarer parents] to choose between following the precepts of [their] religion and forfeiting [special educational services for their handicapped children], on the one hand, and abandoning the precepts of [their] religion in order to accept [the services], on the other hand." *Sherbert,* 374 U.S. at 404. Kiryas Joel parents "cannot exercise both rights simultaneously because the [decision of the Court of Appeals] has conditioned the exercise of one on the

surrender of the other." *McDaniel*, 435 U.S. at 626. As the *Sherbert* Court declared, "[g]overnmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine. . . ." *Sherbert*, 374 U.S. at 404.

Chapter 748 represents a permissible accommodation, with minimal consequences to third parties, which provides a means whereby Satmarer students can receive the secular educational services guaranteed by law without having to sacrifice their religious traditions. Thus, the statute should be upheld.

CONCLUSION

For all the foregoing reasons, the judgment of the New York Court of Appeals should be reversed.

Respectfully submitted,

NANCY J. GANNON
ANDREW MCCAULEY
1011 First Avenue
New York, NY 10022
(212) 371-3191

ROBERT A. DESTRO
Columbus School of Law
Catholic University of America
Washington, D.C. 20064
(202) 319-5140
Attorneys for Catholic League for Religious and Civil Rights

JAY ALAN SEKULOW
(Counsel of Record)
JAMES MATTHEW HENDERSON, SR.
MARK N. TROOBNICK
1000 Thomas Jefferson St., N.W.
Suite 520
Washington, D.C. 20007
(202) 337-2273

KEITH A. FOURNIER
JOHN DAVID ETHERIEDGE
1000 Centerville Turnpike
Virginia Beach, VA 23464
(804) 523-7570
Attorneys for American Center for Law and Justice

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